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BEFORE THE ARIZONA CORPORATION

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COMMISSIONERS

BOB STUMP, Chairman  
GARY PIERCE  
BRENDA BURNS  
BOB BURNS  
SUSAN BITTER SMITH

2013 SEP 11 P 2:13

AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of:

DOCKET NO. S-20867A-12-0459

TRI-CORE COMPANIES, LLC, an Arizona  
limited liability company,

**SECURITIES DIVISION'S MOTION TO  
ALLOW TELEPHONIC TESTIMONY**

TRI-CORE MEXICO LAND  
DEVELOPMENT, LLC, an Arizona limited  
liability company,

TRI-CORE BUSINESS DEVELOPMENT,  
LLC, an Arizona limited liability company,

ERC COMPACTORS, LLC, an Arizona  
limited liability company,

ERC INVESTMENTS, LLC, an Arizona  
limited liability company,

C&D CONSTRUCTION SERVICES, INC.,  
a Nevada corporation;

PANGAEA INVESTMENT GROUP, LLC,  
an Arizona limited liability company, d/b/a  
Arizona Investment Center,

JASON TODD MOGLER, an Arizona  
resident,

BRIAN N. BUCKLEY and CHERYL  
BARRETT BUCKLEY, husband and wife,

CASIMER POLANCHEK, an Arizona  
resident,

NICOLE KORDOSKY, an Arizona resident,

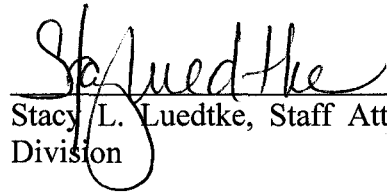
Respondents.

Arizona Corporation Commission  
**DOCKETED**  
SEP 17 2013

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1 The Securities Division of the Arizona Corporation Commission requests leave to present  
2 the telephonic testimony of Arlene Francis, Lisa Davis, Matthew Chan, Kimberly Brown, Warren  
3 Schumacher, Jerome Guissaas and/or Jeannene Barnes during the hearing in the above-referenced  
4 matter. Each prospective witness possesses knowledge relevant to matters in dispute. All of the  
5 witnesses, with the exception of Barnes, reside outside the state. Requiring them to appear in  
6 Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to  
7 appear and give testimony telephonically solves this problem while facilitating the preservation  
8 and introduction of relevant information and a full opportunity for questioning by all parties.  
9 Accordingly, good cause exists for granting such leave and doing so would not infringe upon the  
10 Respondents' procedural due process rights. For these reasons, which are more thoroughly  
11 addressed in the following Memorandum of Points and Authorities, this motion should be granted.

12 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of September, 2013.

13   
14 Stacy L. Luedtke, Staff Attorney for the Securities  
15 Division

16  
17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. Introduction**

19 The Securities Division ("Division") of the Arizona Corporation Commission  
20 ("Commission") anticipates calling Arlene Francis, Lisa Davis, Matthew Chan, Kimberly Brown,  
21 Warren Schumacher, Jerome Guissaas and/or Jeannene Barnes as a central witnesses during the  
22 hearing in this matter. These individuals are investors in the investments referenced in the Notice,  
23 and can provide probative testimony that supports a number of the allegations brought by the  
24 Division. The burden of traveling to Phoenix to provide testimony in person, however, is  
25 impractical for these witnesses because Francis and Chan reside in California, Davis resides in  
26 Nevada, Brown resides in Tennessee, Schumacher resides in Illinois, and Guissaas resides in

1 Minnesota. Barnes, although an Arizona resident, has a previously scheduled vacation that would  
2 incur unnecessary expenses to cancel, and has agreed to testify telephonically. The simple and  
3 well-recognized solution to this problem is to permit them to testify telephonically. Through this  
4 manner, not only will relevant evidence be preserved and may be introduced, but all parties will  
5 have a full opportunity for questioning, whether by direct or cross-examination of these witnesses.

## 6 **II. Argument**

### 7 **A. Good cause exists for permitting telephonic testimony.**

8 “When considering telephonic testimony, the initial inquiry should be whether good cause  
9 has been shown for its use.” *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409  
10 (2010). “In determining whether good cause has been demonstrated, the court may consider  
11 whether the hearing can conveniently be continued to allow in-person testimony.” *In re HM*, 225  
12 Ariz. at 181 n.4, 236 P.3d at 408 n.4. “It may also consider the costs of bringing experts or other  
13 witnesses to court....” *Id.* In the instant case, the above witnesses possess relevant knowledge of  
14 the subject investment offer and sale, the Respondents’ business practices, and related documents,  
15 but, because they reside in other states, or, for Barnes, have a previously scheduled vacation, they  
16 are practically unavailable for in-person testimony.

17 The majority of the witnesses are not merely out of town on the dates set for hearing, but  
18 live out of state. They would be unavailable to testify in person even on a rescheduled hearing  
19 date. Although Barnes may be available to testify in person on a rescheduled date, it is more  
20 practical to allow her to testify telephonically during the Division’s case in chief given that the  
21 Division’s other witnesses – minimally ten to twelve – have made themselves available for the  
22 current hearing dates in October. Additionally, the cost of bringing the witnesses to Phoenix or  
23 paying for a rescheduled vacation would be prohibitively expensive for the Division. Moreover, it  
24 is anticipated that the above witnesses would testify under direct examination for less than an hour  
25 each. Given this amount of testimony, travelling from as far as Tennessee is all the more  
26

1 impractical. Permitting the witnesses to appear telephonically would greatly reduce the burden of  
2 presenting their testimony on both the witnesses and the Division.

3 Therefore, good cause exists for permitting the above-referenced witnesses to testify by  
4 telephone.

5 **B. Permitting telephonic testimony does not infringe upon the Respondent's procedural**  
6 **due process rights and is within the Commission's administrative rules and practice.**

7 Upon finding good cause for using telephonic testimony, consideration should be given to  
8 "whether admission of telephonic testimony comported with due process." *In re HM*, 225 Ariz. at  
9 182, 236 P.3d at 409. What constitutes due process "is not a technical conception with a fixed  
10 content unrelated to time, place and circumstances," but, rather, takes into account "such  
11 procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319,  
12 334 (1976) (internal quotations omitted). In a civil administrative proceeding, procedural due  
13 process requires balancing: (1) the individual's interests; (2) government's interests; and (3) the  
14 "likely impact of telephonic testimony on the accuracy and fairness of the process." *In re HM*, 225  
15 Ariz. at 182, 236 P.3d at 409.

16 The competing interests are protected by procedural safeguards inherent in telephonic  
17 testimony. Individuals have an interest in due process, property and liberty. Government interests  
18 typically include, among other things, protecting the public from harm (*id.*) and in "conserving  
19 fiscal and administrative resources." *Mathews*, 424 U.S. at 347-48. Witnesses appearing by  
20 telephone are subject to cross examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.  
21 Moreover, telephonic testimony "preserves paralinguistic features such as pitch, intonation, and  
22 pauses that may assist an ALJ in making determinations of credibility." *T.W.M. Custom Framing*  
23 *v. Indus. Comm'n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000). At the same time,  
24 appearing telephonically preserves state resources that would otherwise have to be spent on travel  
25 and accommodations. Accordingly, telephonic testimony "does not significantly increase the risks  
26 of an erroneous deprivation." *In re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

1        Permitting telephonic testimony would have minimal negative impact on the accuracy and  
2 fairness of the evidentiary process. The witnesses at issue, though appearing by telephone, would  
3 be still be subject to cross examination by the Respondents' counsel and the Court could still make  
4 determinations of credibility based the manner in which the witnesses testify. Furthermore,  
5 permitting telephonic testimony would enable the Division to present evidence that furthers the  
6 Commission's interests in protecting the public from the harm allegedly committed by the  
7 Respondents and in conserving its financial and administrative resources. Therefore, permitting  
8 the above witnesses to testify by telephone does not infringe upon the Respondents' procedural  
9 due process rights.

10        In addition, the Arizona Corporation Commission promulgated the Commission's Rules of  
11 Practice and Procedure that are intended to "be liberally construed to secure just and speedy  
12 determination of all matters presented to the Commission." *See* A.A.C. R14-3-101(B). They  
13 encompass the use of other forms of testimony during administrative hearings. More specifically,  
14 Rule R14-3-109 states, "In conducting any investigation, inquiry, or *hearing*, neither the  
15 Commission, nor any officer or employee thereof shall be bound by the technical rules of  
16 evidence, and no informality in any proceeding or *in the manner of taking of testimony* shall  
17 invalidate any order, decision, rule, or regulation made, approved, or confirmed by the  
18 Commission." *See* A.A.C. R14-3-109(K) (emphasis added).

19        In light of the relaxed evidentiary and procedural rules governing administrative hearings  
20 in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
21 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
22 telephonic testimony in its administrative hearings to introduce probative evidence. *See, e.g., In*  
23 *the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*  
24 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan*  
25 *Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services*  
26 *Corporation et al.*, Docket No. S-03177A-98-0000. Therefore, permitting the above witnesses to

1 testify by telephone is consistent with the rules and customary practice in administrative hearings  
2 before the Commission.

3 **III. Conclusion**

4 Permitting Arlene Francis, Lisa Davis, Matthew Chan, Kimberly Brown, Warren  
5 Schumacher, Jerome Guissaas and/or Jeannene Barnes to testify telephonically at the upcoming  
6 administrative hearing allows the Division to present relevant witness evidence that is expected to  
7 be reliable and probative, is fundamentally fair, and does not compromise Respondents' due  
8 process rights. Therefore, the Division respectfully requests that its motion for leave to present  
9 such telephonic testimony be granted.

10 RESPECTFULLY SUBMITTED this 17th day of September, 2013.

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13 Stacy L. Luedtke, Staff Attorney for the Securities  
14 Division  
15

16 ORIGINAL and 9 copies of the foregoing  
17 filed this 17th day of September, 2013 with:

18 Docket Control  
19 Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, AZ 85007

20 COPY of the foregoing hand-delivered  
21 this 17th day of September, 2013, to:

22 The Honorable Marc E. Stern  
23 Administrative Law Judge  
Arizona Corporation Commission  
1200 W. Washington St.  
24 Phoenix, AZ 85007

25 COPY of the foregoing mailed  
26 this 17<sup>th</sup> day of September, 2013, to:

1 Dale B. Rycraft Jr., Esq.  
2 THE RYCRAFT LAW FIRM, PLLC  
3 2929 N. Power Rd., Suite 101  
4 Mesa, Arizona 85215  
5 *Attorney for C&D Construction*

6 Jeremy Geigle, Esq.  
7 Mark Heath, Esq.  
8 Jackson White, PC  
9 40 N. Central, Ste 200  
10 Mesa, Arizona 85201  
11 *Attorney for Brian & Cheryl Buckley*

12 Bobby Thrasher, Jr.  
13 530 E. McDowell Rd., Ste 107-495  
14 Phoenix, Arizona 85004  
15 *Attorney for Mogler, Tri-Core Companies, Tri-Core Business Dev.,*  
16 *ERC Compactors, ERC Investments*

17 Nicole Kordosky  
18 1075 N Miller Rd #149  
19 Scottsdale, Arizona 85257  
20 *Respondent*

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22  
23  
24  
25  
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